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Remedies Summary Document for Hypothetical Exam

Week 1: Judicial Remedies:

- Torts (Defamation, property damage, general principles)
- Contract Damages, specific performance, injunctions, equitable compensation and damages and enforcement of orders.

Alternative forms of remedies: ADR, Public Law Remedies, Restorative Justice, Reparations for human rights abuses.

Types of Damages:

- Exemplary/Punitive: Says to defendant you behaved badly and you should pay more
- Aggravated: Look at plaintiff and see if they suffered more as a result of the defendant's behaviour.
- Vindication: Usually in defamation case.
- Nominal: Damages for the sake of rights being infringed without loss.

Week 2: Self Help in Torts – Personal Injury Damages

Action and Cause of action: Hamid v Peter – Personal Injury

Aim: Personal injury to compensate as if never had occurred.

Injury: defined under s 11 as pre-natal injury, impairment of physical or mental condition or disease.

Tort Compensation Principle (Restitutio in integrum): We seek to put person in position as if tort had never occurred. Where an injury is to be compensated by damages the sum of damages should seek to put the injured party in the same position as he would have been in if he had not sustained the wrong.¹ (*Livingstone v Raywards Coal Co*)

Once and For All Rule: This compensation will cover all losses both past and future in relation to the injury in order to provide finality and fairness to the defendant (*Murphy v Stone-Wallwork*).²

Unconditional Award: It should also be noted that this lump sum award is unconditional and you will be free to do what you please with the money (*Todorovic v Waller*).

- Exceptions:
 - CLA Div 7 ss 22-26: Structured settlements
 - S 22 periodic payments funded by annuity or similar

Date of Assessment of Damages –

- In tort for personal injury the date of assessment is the trial date.
- Exception for wrongful birth and wrongful death

Recoverable Heads of Loss - Damages for Economic Loss (CLA Div 2)

Loss of Earning Capacity - S 12: No loss exceeds 3 X av weekly earnings at the date of the award

¹ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, at 39.

² *Murphy v Stone-Wallwork (Charlton) Ltd* [1969] 1 WLR 1023 at 1027.

- **Past (btw Injury & Trial):** Interest is paid on the past because its money you should have but you don't have s 18 and this only relates to s 12 losses. Plaintiff may not have been able to work up until the trial.
- **Future:**
- **Step 1:** Estimate earnings over lifetime if uninjured. (eggshell skull rule, minimise damage)
- **Step 2:** Deduct what now capable of earning; work related expenses; lost years.
- **Step 3:** Convert to lump sum (apply 5% discount CLA s 14, 3% for CL)
- **Step 4:** Adjust for contingencies (positive and negative, s 13 CLA) Most likely future circumstances. Prospects for promotion, future education, likelihood of unemployment or prison, child rearing responsibilities and marriage. *Wynn v NSW Insurance Ministerial Corporation*=saved on travel, costs, tools (*Sharman v Evans*), no childcare deduction,
 - Depends on extent to which PL can prove their full capacity would have been exercised in the future. A loss of capacity that is not fully exploited will not be compensated as such (*Mann v Ellbourne*). For stable employment loss of capacity will be valued by reference to usual wages. Should be based on net income (*Cullen v Trappell*).
 - **Residual Capacity:** *Montemaggiore v Wilson* – tree lopper found other employment and had 50% residual capacity
 - **Lost Years Rule:** When someone is catastrophically injured and they will die before their expected life (retirement). Allow recovery but costs of PL's own maintenance in lost years must be deducted: *Skelton v Collins*. No reduction in work related expenses because she will be dead.
 - **Loss of Entitlements:** sickpay, holiday pay are allowed (*Graham v Baker*) but voluntary payments by employer are not deductible. (*Allev*)
 - **Receiving future salary in advance gives PL advantage**
- **New needs created** (*Teubner v Humble*)³: seeing doctors, buying new equipment, modify your house
- **Damages for gratuitous care - S 15:** Known as **Griffiths v Kirkemeyer Damages** awarded for care that is provided by family/friends to plaintiff gratuitously.
 - S 15B: Damages for loss of domestic capacity (*Sullivan v Gordon* cf *CSR v Eddy*. If you can not do your caring responsibilities for 3rd parties anymore.
- **Past out of pocket expenses:** All reasonable medical treatments and expenses to injury are recoverable upon proof.
 - Duty to accept reasonable medical treatment to mitigate loss under *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

Damages for Non-Economic Loss (CLA Div 3)

- **S 16:** Determination of damages for non-economic loss
 - s 16 (2) – capped at \$400, 000 (indexed) for 'a most extreme case' (MEC)
 - s 16 (1) min threshold 15% MEC (ss17, 17A also apply)
- **Pain and suffering, Disfigurement, Loss of enjoyment of life, loss of life expectancy (Teubner v Humble)(section 3)**
- Global figure that isn't broken down into 3 different things.

³ *Teubner v Humble* (1963) 108 CLR 491.

- If the severity of the non-economic loss is equal to or greater than 15% of a most extreme case, the damages are determined in accordance with the table.

Economic Discounts:

S 13: Vicissitudes Discount – Claimant must satisfy the court that the assumptions about future earning capacity accord with the claimant's most likely future circumstances BUT FOR the injury (s 13(1)). The court then determines the %age possibility that the plaintiffs circumstances might have occurred anyway. 15% is normally adopted (*Macarthur*)

Things like: Prospects of promotion, future educational opportunity, likelihood of unemployment/imprisonment, working life remaining, child rearing.

S 14: Present Value Discount – To offset benefit of having all future notional earnings in lump sum now (e.g can increase it by investment). The present value of that future economic loss is determined by adopting the prescribed discount rate. 3% at CL and 5% under CLA s 14(2)(b).

- Applies to all future econ loss - OPs, care costs incl *G v K*
- Doesn't apply to past loss or non-economic loss

S 18: Interest on damages – no interest on damages awarded for non-economic loss, gratuitous attendant care services under s 15 and loss of domestic capacity under s 15B. Interest on damages does apply to past economic loss because we are kept from earning money until damages assessed.

Certainty and Proof of Loss (Causation) for future

In tort you must distinguish between events that would have/might have occurred, and those which have occurred (*Malec v JC Hutton Pty Ltd*). So if on the balance of probabilities the event was reasonably foreseeable 100% damages will be awarded.

Mitigation: British Westinghouse Electric & Manufacturing Co Ltd

Hypothetical Structure Personal Injury Damages

1. Action and cause of action

2. Compensation Principle: The aim is to compensate X to put them back in the position as if the tort had never occurred. Where an injury is to be compensated by damages the sum of damages should seek to put the injured party in the same position as he would have been in if he had not sustained the wrong. (*Livingstone v Raywards Coal*) This compensation is in the form of an unconditional once and for all lump sum.

3. Other rules: Date of assessment (trial date) and unconditional award.
Governed by the CLA.

The plaintiff has suffered these losses

4. Economic Loss: Go first to CLA section and back it up with CL.

- 4.1: S 12 - Damages for loss of earnings or earning capacity.
 - **Past:** Interest is paid on the past because its money you should have but you don't have s 18 and this only relates to s 12 losses.

- **Future:** Will obtain lump sum for all future losses (once and for all rule), receiving future salary in advance gives PL advantage, use table to compute present value of future continuing losses (s 14), Discounted 5%, vicissitudes s 13.
- FOR BOTH types there is a cap of 3 X average weekly earnings at the date of the award. (s 12(2)) example: av w/e NSW F/T adult: \$1410.50 (19/5/12) x 3 = \$4231.50 max
- **4.2: S 15:** Damages for gratuitous care: Known as Griffiths v Kirkemeyer
Damages awarded for care that is provided by family/friends to plaintiff gratuitously. Damages paid to PL not carer.
 - Past: Medical expenses pre-trial (SVW 578) PL duty to mitigate (*Sharman v Evans*: must live in hospital because its cheaper!)
 - Look at s 15 for thresholds and tests.
 - S 15B: Damages for loss of domestic capacity (*Sullivan v Gordon* cf *CSR v Eddy*.
If you can not do your caring responsibilities anymore.
 - Only in respect to those defined in act
 - Reasonable need and expectation to provide care
 - Least 6 hours per week for 6 months.
- New needs created: seeing doctors, buying new equipment, modify your house.

5. Non-economic loss:

- 5.1: s 16 Determination of damages for non-economic loss
 - s 16 (2) – capped at \$400, 000 (indexed) for ‘a most extreme case’ (MEC)
 - s 16 (1) min threshold 15% MEC (ss17, 17A also apply) (if I doesn’t meet the threshold you get no damages)
- 5.2: Pain and suffering, Disfigurement, Loss of enjoyment of life. (*Teubner v Humble*)

6. Certainty of Loss:

- In tort you must distinguish between events that would have/might have occurred, and those which have occurred (*Malec v JC Hutton Pty Ltd*).
- Court must adjust damages by ref to % possibility that 'events' might have occurred but for injury - s 13(2) – consistent with C/L *Malec v Hutton* (SVW 568)

7. Discounting for Vicissitudes –

- Onus on PL – assumptions relating to future earning capacity must accord with future likely circum if uninjured (s 13(1)).

8. Conclusion

Wrongful DEATH

Law Reform (Miscellaneous Provisions) Act 1944 (NSW): the estate of a person killed retains any cause of action the deceased would have had. Generally limited to recovering lost earning capacity at the date of death, medical expenses and value of services.

Negligent Actions causing injury.

Multiple Causes and Contrib Neg: Wk 3 158. *March v Stramare*

Week 3: Defamation

Compensation provides vindication of the plaintiff to the whole world, personal consolidation for the wrong suffered, and reparation for any harm done to the plaintiff's personal and business reputation (*Carson v John Fairfax & Sons Ltd*). This will be achieved by a lump sum. Damages are 'at large' and not limited to proven pecuniary loss.

The vindication purpose is concerned with the attitude of the outside world to the plaintiff and the award must therefore be sufficiently large to signal to society the vindication of the plaintiff both at the time the award is made and into the future: *Broome v Cassell & Co Ltd* [1972] AC 1027M 1071; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 70.

The consolation purpose puts the focus on remedying the plaintiff's personal hurt, anxiety, loss of self-esteem and general indignity and outrage felt as the result of the defamation: *Herald & Weekly Times v McGregor* (1928) 41 CLR 254, 272; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

The award has a reparation purpose. General damages are intended to repair the harm that the publication of a defamatory statement will presumably have caused. Financial damages beyond this, for example loss of employment, loss of profits or loss of business can be assessed as special damages, provided the plaintiff can establish it: *Commissioner of Taxation (Cth) v Sydney Refractive Surgery Centre Pty Ltd* (2008) 253 ALR 59. In appropriate circumstances, damages may also be awarded to compensate for actual physical and/or mental illness directly attributable to the defamation. In both situations, the common law principles of causation and remoteness apply but the assessment of damages is not subject to the civil liability legislation. .

Defamation Act 2005 (NSW) Part 4 Div 3:

- S 7: The publication of defamatory matter of any kind is actionable without proof of special damage.
- S 22: judge determines damages
- S 34: Must be appropriate and rational relationship between PL's harm and damages awarded (*Carson v Fairfax*)
- Injury to reputation: Damages compensate for injury to feelings and loss of esteem.
- S 35: Cap of \$250,000 for general damages.
- S 37: Exemplary damages cannot be awarded.
- S 38: Mitigating Factors:

(1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:

- (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter, or
- (b) the defendant has published a correction of the defamatory matter, or
- (c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter, or
- (d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter, or
- (e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

(2) Nothing in subsection (1) operates to limit the matters that can be taken into account by a court in mitigation of damages.

- S 39: If the court in defamation proceedings finds for the plaintiff as to more than one cause of action, the judicial officer may assess damages in a single sum.
- **Division 2 – Defences**

- **s25 Justification-** Defendant needs to prove that the defamatory imputations conveyed by the matter complained of by the plaintiff are substantially *true, namely, true in substance or not materially different from the truth.*
- **s26 Contextual truth-** defendant to prove that the matter carried, in addition to the defamatory imputations alleged by the plaintiff, *one or more other imputations which are substantially true (the contextual imputations)*, and that the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations
- **s27 Absolute privilege**
- **s28 Publication of public documents**
- **s29 Fair report of proceedings of public concern**
- **s30 Qualified privilege for provision of certain information**
- **s31 Honest opinion-** publication of matter that is an expression of opinion honestly held by its maker, as opposed to statements of fact. Must concern a matter of public interest and must be based on proper material
- **s32 Innocent dissemination-** modelled on equivalent common law subordinate distributor defence. Defendants can prove that they were not aware that the publication was defamatory, that this ignorance was not due to their own negligence and that there were no grounds for supposing that the publication was defamatory- ***Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574***: High Court supported a finding that innocent dissemination defence was not available to the Channel 7, due to their ability to control and supervise the making of an offending television broadcast program, therefore not a subordinate distributor.
- **s33 Triviality**

Mitigating Factors under CL

- Defendants belief that their statement was true: *Forsdike v Stone* (1868)
- Plaintiffs provocation: *Moore v Oastler*
- Plaintiff did not have a good reputation prior to the defamatory statement: *Scott v Sampson*

Injury to Feelings:

- In assessing damages for injury to feelings, the rule that a defendant must take the plaintiff as she finds her applies (*Smith v John Fairfax and Sons Ltd* (1987) 86 FLR 343, 374.)
- Aggravated damages can be awarded to compensate for increased mental distress and hurt suffered through conduct of the defendant which is improper, unjustifiable or lacking in bona fides (*Triggell v Pheeney* (1951) 82 CLR 497, 517). Such an award may exceed the cap placed on damages for non-economic loss where the 'circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages'.
- Circumstances which may increase the hurt and so justify an award for aggravated damages include:
 - The manner of publication (for example, actual malice or sensationalisation or repetition or re-publication) of the defamatory statement. Note, however that under the uniform defamation legislation, malice or any other mental state of the def is to be disregarded 'except to the extent that it affects the harm sustained by the plaintiff'.
 - If the def fails to make any apology or makes one in such an inadequate form or so belatedly as to exacerbate the plaintiff's sense of injury: *David Syne & Co Ltd v Mather* [1977] VR 516.

- Where the improper mode of conduct of the defence case is an aggravation, for example by making a bogus plea of truth or justification: *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579.
- Clear evidence from the plaintiff of the falsity and untruthfulness of the defamatory statement (*Rigby v Associated Newspapers* [2008] NSWCA 183).
- If the plaintiff has a particularly good and unblemished record prior to the defamation, then this in itself may provide a ground for an award of aggravated damages: *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474.
- Aggravated damages will often, but do not need to, be assessed as a separate amount: *Cerutti v Crestside Pty Ltd* [2014] QCA 33.

Week 3: Compensation for Damage to Property

Compensation Principle: Put the person back in the position as if the tort had not occurred. E.g. if value man deceives you about house value and its worth half of what they said, the idea is to sell the property for \$500k and sue him for the difference. In Australia it turns on whether the court is satisfied if what is being asked for is reasonable or not.

2 Main Ways to Assess compensation:

1. Damages based on diminution of value
2. Damages based on cost of repair.

If the cost of restoration is more than the diminution in value or the replacement cost, court will consider if cost of restoration is best.

***Evans v Balog*:** House was damaged beyond repair. Zoned for high-rise. PL convinced court their desire to rebuild house was legitimate (family home, defendant possibly getting away with wrong). Lump sum means they could take money and still develop land! Court said that they had in effect lost their family home and fair compensation requires that they be given back what they had before and the only way in which that purpose can be achieved is to award them the sum reasonably necessary to restore their property to the condition in which it was before the def effectively destroyed it. (this was held even though the house had no market value).

***Pantalone v Alaouie*:** Property owner leased it to restaurant. PL sought damage to rebuild. Court said unreasonable. Diminished value and lower sum awarded, because no emotional value attached like there was in *Evans*.

Consequential Losses

- Loss of Profits: If the property was profit earning the plaintiff can seek compensation for loss of profits. In *Pantalone v Alaouie*, the award included the loss of rent. *Gagner v Canturi*, the court awarded compensation for 10 days business interruption (at a rate agreed by the parties) to cover the period during which the shop premises would have had to be closed to affect restoration.
- Incidental Expenses: If the purchaser of defective property decides to repair the defects, he or she is entitled to claim incidental expenses of taking reasonable remedial action: *Hood v Shaw* (1960) 176 EG 1291.
- Non-pecuniary injury: Such as injury to feelings, inconvenience and vexation (*Perry v Sidney Phillips* (1982)). But common law in this area is now subject to statute. E.g. Psychiatric injury in consequence of property damages or pure economic loss is categorised as 'pure mental harm' under the CLA. The law relating to recovery of damages for pure mental harm has changed substantially since *Campelltown* case. Reasonable foreseeability of this type of harm is the primary determinant of liability and shock is merely one of the factors taken into consideration in determining the existence

of a duty of care, rather than being a pre-requisite to liability: *Tame v New South Wales* (2002) 211 CLR 317. Damages for physical convenience, which are not dependent of the proof of any pecuniary loss, have long been recognised: *D Galambos & Son Pty Ltd v McIntyre* (1974) 5 ACTR 10.

- ***Campbelltown City Council v McKay (nervous shock or mental illness as consequential loss)***: Marriage breakdown: court wasn't satisfied their mental illness was nervous shock. But breach of contract and negligent damage to property=consequential mental loss. The question is whether the consequential damage is a reasonably foreseeable result of the def's negligence. The plaintiff ought to have known that if the house collapsed the plaintiff would suffer distress or anxiety or a psychiatric condition.
- No damages for mere sorrow or upset.
- Where physical injury, then pain & suffering and mental anguish recoverable as consequential loss. – ie in an action for damages for physical injury, a plaintiff who has suffered physical injury is entitled to recover for consequential psychiatric illness. It is enough that the psychiatric condition is reasonably foreseeable result of the def's negligence.
- Damages available for nervous shock/ mental harm even where no physical injury – but psychiatric injury more restricted.
- property=consequential mental loss.

Interference with enjoyment of land:

Oldham v Lawson (No 1)

- Action for loss of tranquillity/interference with enjoyment of premises. Court found nuisance.
- If interference is minimal damages will likely be nominal (*Hill v Higgins*) and only made for the purpose of vindicating the plaintiffs right to exercise exclusive occupation over their land.

Damage/Destruction of Goods (436)

- Normal measure of damage=cost of repair + lost profits or hire costs + any residual diminished value after repair.

Valuation of Damaged Goods:

- *Hoad v Scone Motors*: 7 yr tractor destroyed, urgently needed replacement and no similar ones available, replaced with new, not practical to buy second hand.
 - Normal rule is PL not forced to invest in new equipment against will.
 - *Gagner v Canturi*: You should get something like original. Only asked for reasonable costs for restaurant fit-out.
 - *Harbutts Plasticine*: No discount on 'new for old'.
 - In *Hoad* a replacement for the old tractor would have been a second hand tractor of the same vintage, but this couldn't be found. Without the tractor they could not carry on farming which they needed to do to stay in business. The tractor was profit earning and in addition to the cost of replacement they would be entitled to loss of profits. They were bound to take reasonable steps to mitigate losses. The fact that they needed the tractor for business and couldn't find a likewise one makes the purchase of a new tractor reasonable and entitle them to recover the money spent.
- *British Westinghouse*: New turbines made them more money. Less damages
- *Hoad v Scone Motors* : When tractor was destroyed they were contemplating in 18 months to stop farming and do something else. So court said in this case they can't get the full amount of the tractor because they are going to leave the business and end up